FILE COPY.

OFFICE SUPREME COURT
FILED
NOV 7 1906
JAMES H. McKENN

(19,801)

Supreme Court of the United States

OCTOBER TERM, 1906

NO. 47.

N. L. REARICK,

Plaintiff in Error.

VS.

THE COMMONWEALTH OF PENNSYLVANIA,

Defendant in Error.

IN ERROR TO THE SUPERIOR COURT OF PENNSYLVANIA.

Brief and Argument for Defendant in Error.

HARRY S. KNIGHT,
S. P. WOLVERTON,
Attorneys for Defendant in Error.

(19,801)

Supreme Court of the United States

OCTOBER TERM, 1906

No. 47.

N. L. REARICK,

Plaintiff in Error.

VS.

THE COMMONWEALTH OF PENNSYLVANIA,

Defendant in Error.

IN ERROR TO THE SUPERIOR COURT OF PENNSYLVANIA.

Brief and Argument for Defendant in Error.

STATEMENT OF THE CASE.

Sunbury Borough has an Ordinance which provides *inter alia* "that it shall be unlawful for any person to sell at retail by sample or otherwise, or to solicit orders for, sell or *deliver at retail* either on the streets or by traveling from house to house * * * * any foreign or domestic goods, &c., without a license," and excepts from its operation manufacturers and producers selling their own products.

Kunkle, an agent of the Citizens' Wholesale Supply Company of Ohio, canvassed from house to house in Sunbury and took orders by sample for groceries, brooms, &c. These orders were transmitted to Ohio. There, groceries to fill each order were packed in separate boxes, each box being marked "N. L. Rearick for———" (the name of the person ordering the goods). Where a broom had been ordered, the person's name was written on the handle and then all the brooms that had been ordered for Sunbury tied together in the usual bunches of one dozen each and all marked "N. L. Rearick." All of these goods were placed in a railroad car and consigned to N. L. Rearick at Sunbury, (Rearick was the agent of the Ohio Company for delivering goods and receiving the money therefor) who alone had authority to receive the same from the Railroad Company at Sunbury and who alone was responsible to the Ohio Company for same. Rearick received the goods at Sunbury, delivered the several boxes by wagon to the persons whose names were marked thereon, cut the bundles of brooms and delivered by wagon each broom to the person whose name was written on the handle thereof, and received the money therefor. It was for Rearick's part in this transaction that he was arrested and convicted for a violation of the Sunbury Ordinance, which conviction was subsequently sustained by the Superior and Supreme Courts of Pennsylvania.

ARGUMENT.

The questions raised by the plaintiff in error we believe can be fully considered under the following general heads:

I.

Was the Plaintiff in Error at the time of delivering the goods in question, viz., groceries and brooms, engaged in inter state or infra state commerce? Under this head

A. Where did the sale take place?

B. Was delivery made to the consumer in the original package?

II.

*If Rearick, the Plaintiff in Error, at the time of delivering the goods was engaged in inter state commerce, is the Sunbury Ordinance in question an unconstitutional regulation of inter state commerce? That is, does it violate clause 3, section 8 of article 1 of the Federal Constitution, which provides "Congress shall have power * * * to regulate commerce with foreign nations and among the several states."*

A. Considered as a license tax.

B. Considered as a police regulation.

III.

Does the Sunbury Ordinance in question violate Section 1 of the Fourteenth Amendment to the Federal Constitution?

We shall consider these questions in the above order.

I.

WAS REARICK, THE PLAINTIFF IN ERROR, AT THE TIME OF DELIVERING THE GOODS, ENGAGED IN INTER-STATE OR INFRA-STATE COMMERCE? AND, UNDER THIS HEAD

A. Where did the sale take place?

Commonwealth vs. Hess, 148 Pa. 98, decides that where Hess, a licensed liquor dealer in Philadelphia, received orders by telegraph and by mail from residents of Montgomery county for liquors, and the goods were then set apart in Hess's warehouse for the several parties in Montgomery County and charged on the books of Hess to the several parties in Montgomery County, and then loaded upon the wagon of Hess and delivered from his warehouse to the several parties in Montgomery County and payment made therefor by the Montgomery County parties direct to Hess, either by mailing check or by going to the warehouse of Hess in Philadelphia and paying in person, that this was a sale in Philadelphia.

The particular points which we desire to call to the attention of the Court in this case are:

1. The orders for the liquor delivered were sent to Hess's place of business in Philadelphia from week to week in the usual course of business.

2. The driver of Hess's wagon *did not solicit* orders in Montgomery County.

3. That upon receipt of such orders the goods so ordered were set apart and *charged to the purchaser* upon the books of Hess; the sale in each instance being upon credit.

4. After the orders were received in the usual course of business (which it will be found upon an examination of the succeeding cases was either by mail or telegraph) and

the goods set apart to the respective purchasers and *charged upon the books* of Hess; they were then loaded upon the delivery wagon of Hess and by this wagon delivered to the respective purchasers at their place of business in Montgomery County, and in some instances were shipped by railroad to the purchaser.

5. *Bills were afterwards made out and sent direct to the several purchasers in Montgomery County who paid them either by check sent to Philadelphia or in cash paid in person at the place of business of Hess in Philadelphia, after delivery had been made in Montgomery County.*

In the case of Comth. vs. Holstine, 132 Pa. 357, in which case the opinion of the Supreme Court of Pennsylvania is delivered by the same Justice as in the case of Commonwealth vs. Hess, to wit, Chief Justice Paxton, the Court holds that where Holstine, who was the driver of the delivery wagon of Otto, a licensed bottler having a place of business in the city of Philadelphia, in the course of his regular employment of delivering bottled ale and beer to Otto's customers who had ordered it, was in the habit of taking orders in Montgomery County which he returned to his employer in Philadelphia who filled the orders, and the goods which were set apart to fill the orders were then loaded upon Otto's wagon and delivered in Montgomery County and the money collected therefor by Holstine and returned to his employer, that this transaction constituted a sale in Montgomery County, and that Holstine was therefore guilty of selling liquors in Montgomery County without a license.

The particular points to which we desire to call the Court's attention in this case are:

1. That the orders were solicited in Montgomery County by the agent or employee of Otto, the Philadelphia dealer,

and not sent in from Montgomery County by mail or telegraph in the usual course of business.

2. *That no credit was extended* to the several purchasers in Montgomery County by Otto ; *no charge made upon his books* for their respective purchase and *no bills sent by him* to the respective purchasers, but the goods were loaded upon his wagon and *delivered only upon receipt of cash* for same.

This last mentioned case is cited and commented upon in the opinion of the Supreme Court of Pennsylvania in the case of Commonwealth vs. Hess, *supra*, and distinguished from the case of Commonwealth vs. Hess.

Commonwealth vs. Garbracht, 96 Pa. 449, decides that where Garbracht, a traveling agent of a wholesale liquor dealer, resident in the city of Erie, took orders from residents of the county of Mercer and forwarded the orders to his principal in Erie by mail, who shipped the whiskey so ordered from his house at Erie to the several purchasers in Mercer county by freight or by express, and charged the same upon his books to the respective purchasers, and in some instances these bills were afterwards collected by Garbracht, the agent, that this constituted a sale in the city of Erie and that Garbracht was not guilty of selling without a license in Mercer county.

The particular points to which we desire to call the attention of the Court are :

1. That the orders for whiskey which Garbracht solicited in Mercer county and transmitted to his employer at his store in Erie were shipped by freight or express *consigned to the parties respectively* from whom the orders were obtained, *according to the usual course of business.*

2. That there was no evidence that Garbracht had any

whiskey in his possession in Mercer county, or that *he personally delivered any there.*

3. The evidence being that Garbracht delivered none of these goods himself, but that they were delivered by his principal to the common carrier consigned direct to the several purchasers, we must conclude that *credit was given* by Garbracht's principal to the several purchasers notwithstanding that in several instances he collected bills after the goods had been delivered by the common carrier.

4. That the Court states in its opinion "If there had been evidence to show that he (Garbracht) delivered any whiskey in the latter county or agreed to do so and his agreement was carried out by his principal, a different case would be presented." Garbracht was subsequently tried in the courts of Mercer county and evidence was introduced to show that he agreed to deliver the whiskey in Mercer county and actually did deliver it. He was convicted of selling liquor in Mercer county without a license. This case was appealed to the Supreme Court of Pennsylvania and affirmed and reported in 1 Pennypacker 471, showing, as will appear by a reference to the case last cited, that the delivery by Garbracht or by Garbracht's principals, even though it be in part by a common carrier, if it is done at the expense of the vendor, constitutes a sale at the residence of the vendee.

Commonwealth vs. Fleming, 130 Pa. 138, which is in exact accord with the C. O. D. cases cited by the plaintiff in error, recently decided by this Court, decides that where Joseph Fleming, a wholesale liquor dealer in the city of Pittsburg, caused by his employes and agents, to be advertised in certain papers in Mercer county, and also by handbills distributed at fairs and other public gatherings in Mercer county, that he would sell and deliver liquors C. O. D. in Mercer county to any one who might order by postal card

addressed to his store in Pittsburg, and that in pursuance of said advertisements numerous postal card orders were sent from Mercer county citizens to the place of business of Joseph Fleming in Pittsburgh, for liquors of various kinds, which were packed, marked with the name of the purchaser, C. O. D., and delivered to the Express Company, who transmitted the same to Mercer county and in turn delivered to the several purchasers and collected the money therefor and made settlement with Joseph Fleming, that in this case the sale took place in Pittsburgh and that Joseph Fleming consequently was not guilty of selling liquors without license in Mercer county.

The particular points in this case which we desire to call to the attention of the Court are :

1. That the orders were transmitted from Mercer County to Pittsburgh *by mail*, thereby placing the vendor and vendee in direct communication.

2. That the delivery to the Express Company, the common carrier, was a delivery to the vendee for the reason that the vendor had performed the *whole* of his contract, and for the further reason that they looked alone to the common carrier for the purchase money thereof.

From a careful consideration of these cases, which is the law of the land as well as of Pennsylvania, it will be noticed that goods delivered by the private conveyance of the vendor to the vendee constitute a sale at the place of business of the vendor, *provided that the goods be charged to the vendee on the books of the vendor, and credit extended by the vendor to the vendee.* That although the orders be solicited by the employe of the vendor, if goods, in pursuance of these orders, are shipped by a common carrier or by private conveyance of the vendor *direct to the vendee and*

credit extended to the vendee, that the sale takes place at the store of the vendor. That where the goods are ordered by the vendee from the vendor, to be shipped by express C. O. D., that the vendor has performed fully his part of the contract and completed the sale when the goods are delivered by him to the express company. Upon such delivery to the express company the sale, so far as the vendor is concerned, is complete and that thereafter the common carrier or express company alone is liable to the vendor, and that consequently the sale takes place at the point of delivery by the vendor to the express company, or usually at the residence of the vendor. But that where orders are solicited by the employees of the vendor and transmitted to the vendor at his place of business, and goods set apart to fill said orders, *without extending any credit to the vendee*, loaded upon the conveyance of the vendor and delivered by the employee of the vendor to the persons from whom orders were solicited, and *upon such delivery received payment therefor*, that the sale takes place at the house or residence of the vendee. This is decided in Com. vs. Holstine, supra., and commented upon in Com. vs. Hess, supra.

In the case at bar the orders were taken in pursuance of a house to house canvass. No credit was extended by the Citizens' Wholesale Supply Company to the several persons in Sunbury. Unlike the wholesaler who inquires carefully into the financial standing of the retailer before he marks his name upon a box for shipment, it made no difference to the Citizens' Wholesale Supply Company who the parties were whose names were placed upon the boxes and brooms. Their credit was extended only to Rearick. He alone was responsible for the value of the goods shipped, or the return of the goods themselves. He alone had authority to receive the same from the common carrier. There was no mutuality of contract between the Citizens' Wholesale Supply

Company and the purchaser in Sunbury. They were never brought together. True the order blanks show that the orders were given to the Citizens' Wholesale Supply Co., but the orders were never *accepted* by this Company, and, had the goods not been delivered, no action could be maintained against this Company for non-delivery. "[illegible]ds were to be up to a certain standard, but there was [illegible]ing in the contract to prevent the agent, or those whom he represented, from making a tender or fulfillment of the contract, by bringing goods of the standard required from any city in the State of Pennsylvania."

Having shown that the names of the purchasers marked upon the several boxes and brooms did not, and could not, mean that a sale was made in Ohio to a citizen of Sunbury, and that it was not the intention of the Ohio Company to transfer the title to the goods at the time the names were placed upon them; it must be concluded that these names were placed upon the boxes and brooms either as a device to bring the trade within the protection of the Inter-State Commerce Laws, or as a clerical act to assist the delivery agent; in neither of which cases could it constitute an element in Rearick's defense.

But further than this, in the case at bar the goods were sold by sample and subject to inspection by the vendees, and if not up to the standard of the sample they could refuse to accept. It was said in the case of Com. vs. Hess, *supra*, on page 109, the passing of the title upon a sale of chattels depends upon the intentions of the parties to be derived from the contract and its circumstances (supported by Gonsar vs. Smith, 115 Pa. 452).

Under all the circumstances as set out in the statement of facts, what was the intention of the parties? Was it the *intention* of the Citizens' Wholesale Supply Company that

title pass to the several purchasers in Sunbury when the goods were delivered at the railroad station at Columbus, Ohio, or when they were set apart at Columbus for delivery to Rearick, the plaintiff in error? If so, why did they consign them to Rearick? If so, why were they not charged to the several residents of Sunbury upon the books of the Citizens' Wholesale Supply Company in Columbus, Ohio? Does it not appear that under all the circumstances,—the consignment to themselves by the vendor, the instructions to deliver no goods except for cash, the privilege on the part of the vendee to inspect, the sending on of their own trusted delivery agent to assist in making the delivery rather than to entrust it to the local representative of Sunbury who took the orders,—that the intention of the Citizens' Wholesale Supply Company was beyond a doubt to control absolutely the property in question and title thereto until delivery at the house of the purchaser and the money received therefor? When these orders were taken there was no obligation on the part of the Citizens' Wholesale Supply Company to fill the order, and the residents of Sunbury had no action against the Citizens' Wholesale Supply Co. for the non-fulfilment of such order. In short, the vendee in Pennsylvania never entered into a contract with the vendor in Ohio. There was no contract between Rearick and the vendee to sell goods which were in the State of Ohio. He could have completed his contract by furnishing goods perchance from a Pennsylvania warehouse of the Citizens' Wholesale Supply Company, or, perchance, from any other source within the state.

We submit that the facts bear every test of a sale in Pennsylvania and none of a sale in Ohio; that the sale did not take place until the goods were delivered by Rearick at the residences of the several purchasers, and he, Rearick, received the money therefor, and that Rearick was therefore

selling goods at retail from house to house in Sunbury and was engaged solely in infra-state commerce, and, even though delivery was made in the original package, Rearick and his goods would, nevertheless, under the ruling of this Court in Woodruff vs. Parkham, infra, 75 U. S. 123, and Hinsen vs. Lott, 75 U. S. 148, and other cases hereafter cited, be subject to a general State tax.

B. Was delivery made to the consumer in the original package?

The most recent utterance of the United States Supreme Court on the original package question is contained in the case of Austin vs. Tenn., reported in 179 U. S. 343, &c. A careful perusal of the opinion in Austin vs. Tenn. with reference to the authorities there cited gives a clear interpretation of the legal meaning of an original package. From an examination of this case and the opinion of the Court below it will be seen that a package in the hands of the consumer, in order to be an original package within the meaning of the inter state commerce clause of the Constitution, must be in such shape, size and form as it was delivered by the importer to the common carrier in another state. It is to be adapted to meet the requirements of inter state commerce and not the requirements of an unlawful domestic retail trade.

In the case of May & Co. vs. New Orleans, 178 U. S. 496, the facts were as follows: May & Co. took orders for linens, towels, table cloths, &c., and sent the orders to Europe, together with orders for stock goods. They were imported in bales and boxes. The bales and boxes were broken but none of the manufacturer's packages within were broken.

This Court held that the outer package was the only original package and that the unbroken manufacturers' package, the moment it was separated from the larger bale or box, was subject to state taxation.

Using these definitions as tests, was the broom that was delivered, for instance, to John Doe in Sunbury, received by John Doe in the same size, shape and form of package as it was delivered by the Citizens' Wholesale Supply Co. to the Railroad Company in Columbus, Ohio? It will be remembered that the statement of facts discloses that brooms to fill each order were selected and marked and that they were then tied together in bundles of one dozen each, aggregating in this one dozen package, brooms for several or possibly one dozen persons. Within the decisions above, the original package was the one dozen package of brooms and not each separate broom. If it be construed that each separate broom be an original package then one dozen pasteboard packages of cigarettes tied in a single bundle with a cord or rope and delivered in such a bundle to the common carrier and delivered in turn by the common carrier to a dealer or agent of the consignee in another state, when the cord or rope is cut constitutes twelve separate original packages of cigarettes instead of one.

If then the single broom when delivered to the purchaser ceased to be an original package and was not delivered as such, and the sale of this broom took place when the delivery was made, as it certainly did under the decisions hereinbefore set forth, then Rearick, as the agent of the Citizens' Wholesale Suppy Co. was guilty of making sales from house to house in the Borough of Sunbury, of goods which had become mingled with the common mass of goods in the State of Pennsylvania and would therefore be guilty under the ordinance.

But it was contended by the defendant in the court below that the ruling in these cases do not apply to the case at bar for the reason that in the case at bar each box or broom was marked in Ohio with the purchaser's name. Could it be seriously contended that if in the Austin case, supra., the person to whom the cigarettes had been shipped had sent to the manufacturer in another state a long list of names with a request that he send him one small box of cigarettes for each person, and the manufacturer wrote on each of the small boxes one of the names contained on said list and then aggregated the numerous, small, so labelled,boxes in a basket and shipped them as in the Austin case, that he would be protected under the Inter-State Commerce rulings?

Again, in drawing a parallel between the case of May & Co. vs. New Orleans, *supra*, and the case at bar, what can be the difference, so far as the original package question is concerned, between a manufacturer's package of table cloths ordered by the importer for a specific person whose name is on his books, and a broom ordered for a specific person whose name is on the broom instead of the books? This Court has said that separating the bundle of table cloths from a larger mass of property, with which it was assembled for shipment, was breaking the original package, and that the table cloths thereby became part of the property of the State and subject to its taxation. If this be true, certainly the breaking of a bunch of brooms and separating one broom therefrom causes that broom to become part of the property of the State, and subject to its taxation. When we consider that in the May & Co. case, *supra*, the goods were imports from a foreign country, State taxation of which is absolutely prohibited, and that in the case at bar State taxation is disallowed only when such taxation in effect becomes a regulation of inter state commerce, the parallel becomes all the stronger in our favor.

Rearick was then, at the time of his arrest, selling or delivering from house to house in the borough of Sunbury, brooms which were part of the property of the State, and therefore engaged in infra-state commerce and subject to State regulation.

The foregoing reasoning and conclusion is not in conflict with Brennan vs. Titusville, 153 U. S. 289. It will be noticed from a careful examination of this case that Brennan took orders in the city of Titusville for certain goods, transmitted these orders to his principal in the city of Chicago, and that the goods were shipped direct from the principal to the parties in Titusville who gave the orders, thereby constituting a sale in the city of Chicago, State of Illinois, and not in the city of Titusville and State of Pennsylvania ; in other words credit was given by the principals of Brennan to the several purchasers in Titusville. That this is the fact and that these are the reasons for the decision of the United States Supreme Court, as above stated, is not only made plain in the opinion of the Court, but is commented upon by this Court in the case of Emert vs. Missouri, 156 U. S. 296, in which this Court says, "In Brennan's case it was expressly agreed by the parties that the goods ordered by him for sale in the State of Pennsylvania were afterwards sent by their owner in another State *directly* to the purchasers," showing conclusively that the fact that they were so sent directly, the credit was extended by the citizen of Chicago to the citizen of Pennsylvania, thereby bringing the vendor in one State in communication with a vendee in another, was what prompted this Court in its decision. In short, the principle decided in this case is that where an agent comes from one State into another and there takes an order for goods and transmits it to his principal in the first State, who *accepts* the same, fills it, extends credit to the

buyer and ships the goods direct to the buyer, he is engaged in inter-state commerce.

Another elemeut that is to be taken into consideration in this case that distinguishes it from the case at bar is, that the goods for which orders were taken by Brennan were specially manufactured for each particular customer. Brennan was the agent of a manufacturer and the fact that they were specially so manufactured proves conclusively that it was necessary to bring the vendor in one State in direct communication with the vendee in another. There is another element in this case which would warrant the decision of the Supreme Court in finding it unconstitutional, and which element is not found in the case at bar ; that is, the proviso in the Titusville ordinance reads, "provided that the provisions of this ordinance shall not apply to persons selling by sample to manufacturers or licensed merchants or dealers residing and doing business in said city." Had this proviso had inserted in it, that it should not apply to persons selling to manufacturers or merchants at their place of business there might have been some merit in the classification; but, under the ordinance as it stands, it was possible foi one to solicit orders at the residence of a merchant or manufacturer without a liceuse and not solicit at the residence of the merchant's neighbor who happened to be a lawyer or laborer. Mr. Justice Brewer in speaking for the Court in this case, at the beginning of his opinion, lays stress upon the fact that the question in the Titusville case is whether a *manufacturer* of goods who carries on his business of *manufacturing* in one state can send an agent into another state to solicit orders for the products of his manufactory, without paying to the latter state a tax for the privilege of thus trying to sell his goods.

Neither does the case of Robbins vs. Shelby Taxing District, 120 U. S. 489, cited by the plaintiff in error, apply to

the facts of this case. Robbins was solictiting orders from mercantile houses as a commercial drummer; the goods were shipped direct from his principal to the commercial house, and credit extended to the commercial house. The fact that he was a commercial drummer separates him distinctly from a canvasser. This last statement is amply supported by the language of the Supreme Court of Pennsylvania, in which it says, "There is a very clear distinction between the traveling salesman or drummer acting as the intermediary between the importer or wholesale dealer, and the local trade; and the itinerant canvasser who goes from house to house, intruding himself into the homes of his prospective customers." This statute also contains the fatal geographical discriminating feature, the language of the act being, "All drummers and all persons *not having a regular licensed house of business in the taxing district.*" It will therefore be seen that persons having a place of business within the district are exempt as against those residing without the district. This in itself would warrant the conclusion of the Court. It will also be noted that this case does not have within it the element of house to house solicitation.

In the case of Caldwell vs. North Carolina, 187 U. S. 622, cited by plaintiff in error, the defendant was soliciting orders for portraits and picture frames. Portraits are goods or commodities which necessarily must be made to order. In short, the goods in question involved in the case of Caldwell vs. North Carolina were goods of the defendant's own manufacture, or of his principal's manufacture, and would therefore be exempt from local taxation or regulation under the ruling in Americal Sugar Refining Company vs. State of Louisiana, *supra.*

A careful examination of the facts found by the special verdict in this case discloses that the defendant was delivering pictures and frames for which *contracts of sale* had pre-

viously been made. This implies on its face that there had been a meeting of the minds of the parties, a mutual agreement on the part of one to buy and on the part of the other to sell. In other words, in order that there be a contract of sale it was necessary that the order given in one State be accepted by the principal in another. This would be bringing vendor and vendee together across State lines, and extending credit by the vendor to the vendee. These facts alone distinguish this case from the case at bar, there being nothing in the case at bar to show that the orders taken for goods subsequently delivered had ever been accepted by the Citizens' Wholesale Supply Company of Columbus, Ohio. In the Caldwell case the fact that the orders were so accepted, thereby constituting a contract of sale, evidently was a ruling element in the case, especially in the light of the decision of this Court in Brennan vs. Titusville, *supra*, as commented upon in Emert vs. Missouri, *supra*. We have a right then to assume that the principals of Caldwell in Chicago, Illinois, when they received from Caldwell the orders that he had taken in North Carolina, then and there extended credit to such purchasers in North Carolina and charged such purchasers with the goods in the State of Illinois.

Taking into consideration in the North Carolina case the peculiar nature of the goods sold, to wit, portraits, that when once made they would be of no value to anyone except the party for whom expressly made, are we not warranted in concluding that the vendors or manufacturers in Illinois inquired carefully into the financial standing of the vendees in North Carolina before entering upon the fulfillment of these orders, and then extended credit to them, and if credit were so extended then the sale took place in the State of Illinois, and the case is distinguished thereby from the one at bar.

This ordinance provides that "every person engaged in the

business of selling picture frames, &c. * * * unless the said business is carried on by some person in connection with some other business for which a license has already been paid to the city, shall pay a license tax, &c." It will therefore be seen that the outsider was compelled to pay the license tax while a person who was engaged in some other business and had already paid a license tax as a merchant or trader was exempt. In short, this ordinance contained the fatal geographical discriminating clause, which in itself would warrant the decision of the Court in the Caldwell case and distinguishes it from the case at bar.

We submit then that these three cases are not in conflict with the foregoing argument and that there is nothing in their rulings as applied to the facts of the case at bar that would warrant a reversal of the judgment in this case.

II.

IF REARICK THE PLAINTIFF IN ERROR, AT THE TIME OF DELIVERING THE GOODS WAS ENGAGED IN INTER-STATE COMMERCE, IS THE SUNBURY ORDINANCE IN QUESTION AN UNCONSTITUTIONAL REGULATION OF INTER-STATE COMMERCE? THAT IS DOES IT VIOLATE CLAUSE 3, SECTION 8, OF ARTICLE I OF THE FEDERAL CONSTITUTION WHICH PROVIDES "CONGRESS SHALL HAVE POWER * * * TO REGULATE COMMERCE WITH FOREIGN NATIONS AND AMONG THE SEVERAL STATES * * * ."

A. Considered as a license tax.

In entering upon a discussion of this question let it be remembered at the outset that the commerce clause of the Federal Constitution (Article I Section 8) deals with no

positive and absolute inhibition against the exercising of the local taxing power. A state tax levied upon a person dealing in goods brought from another state or upon the goods themselves, is not prohibited by the commerce clause of the Federal Constitution, neither is it ipso facto in violation thereof. Such a tax violates Article I Section 8, of the Constitution only when its enforcement so operates upon inter-state commerce as to amount to a regulation thereof. American Steel Wire Co. vs. Speed, 192 U. S. 518. Neither is the levying of every tax which remotely and indirectly affects inter-state commerce a regulation thereof in the constitutional sense. American Steel Wire Co. vs. Speed, supra.

It has been held by this Court that where a resident of one state ships goods into another state to its agent, and the agent subsequently hauls the goods through the country and sells them for the account of his principal in another state that he, the agent, and the property are amenable to the tax laws of the state and neither the agent nor the property is exempt from state taxation by virtue of the inter-state commerce clause of the Constitution, Emert vs. Missouri. 156 U. S. 296.

It has been held by this Court that coal shipped from Pennsylvania by a Pennsylvania firm to their agent in Louisiana to be sold by the agent for the account of the shipper and actually was so sold, and was sold in many instances upon the original barges before the same was unloaded, and in some instances sold before arrival; that the coal in the hands of the agent is the subject of state taxation and that the agent is amenable as a dealer to the state taxing power. Brown vs. Houstin, 114 U. S. 622.

It has been held by this Court that when a resident of one state ships whiskey to the resident of another state to be sold by the latter for the account of the shipper, that the whiskey is subject to local taxation and that such taxation is not a

regulation of or unconstitutional interference with inter-state commerce. Hinson vs. Lott, 75 U. S. 148.

It has been held by this Court that a city ordinance authorizing the collection of a tax on sales at auction is valid as applicable to goods which are products of other states, sold in original packages, and that it is not a constitutional regulation of inter-state commerce. Woodruff vs. Parkham, 75 U. S. 123.

It has been held by this Court that where a manufacturing firm in one state sent a representative into other states to take orders for goods that were then in the first state at the factory or not yet manufactured and the goods to fill these orders, viz. nails in kegs, wire in bundles, &c. were subsequently brought into the state where the sales were made, and stored in a warehouse awaiting shipping orders from the purchasers and the goods were delivered in the original shipping packages to the parties who had previously ordered them and charged upon the books of the manufacturing firm in another state; that a state tax upon these goods without discrimination was valid and not a regulation of inter-state commerce. American Steel & Wire Co. vs. Speed, 192 U. S. 518

As it then becomes necessary to ascertain what is meant by "regulating commerce" within the constitutional sense, inquiry should be made into the reason for vesting this power in Congress. Prior to the adoption of the Federal Constitution there existed in every State a jealousy bred of ambition to prosper, at the expense of its sister State. The purpose of the commerce clause of the Constitution was to limit the power of the State to enact discriminating legislation against the products and citizens of its sister State. Says Mr. Justice Field, in Weton vs. Missouri, 91 U. S. 275, speaking of the power to regulate inter-state commerce, "That power was vested in congress to insure uniformity of

commercial regulation against discriminating State legislation. It covers property which is transported as an article of commerce from foreign countries or among the States from hostile or interfering State legislation until it has mingled with and become part of the general property of the country." The ruling factor, therefore, in order to ascertain whether State enactments come within the constitutional meaning of "regulating commerce," is, do they discriminate either in express terms or by implication in favor of the property or citizens of their own State? This, under Mr. Justice Field's ruling, *supra*, is the very essence of determining whether or not a statute constitutes a State regulation; otherwise, if there were no such discrimination, why would it be necessary to protect the property "from hostile or interfering State legislation until it became part of the general property of the country" or State. This Court says, in Woodruff vs. Parham, 75 U. S. 123, "The case before us is a simple tax on sales of merchandise, imposed alike upon all sales made in Mobile, whether the sales be made by a citizen of Alabama or of another State and whether the goods sold are the produce of that State or some other. There is no attempt to discriminate injuriously against the products of other States or the rights of their citizens, and the act is not, therefore, an attempt to fetter commerce among the States or to deprive the citizens of other States of any privilege or immunity possessed by citizens of Alabama." Again, in Hinson vs. Lott, 75 U. S. 148, this Court says, "The act institutes no legislation which discriminates against the products of sister States but merely subjects them to the same rate of taxation which similar articles pay that a remanufactured within the State. We do not see in it an attempt to regulate commerce, but an appropriate and legitimate exercise of the taxing power of the States."

We might continue to cite authorities and quote from the

opinion of this Court, but it is sufficient to say that every state or municipal enactment, from Robbins vs. Shelby Taxing District down to Caldwell vs. North Carolina, that has been held by this Court to be a "regulation of commerce" within the constitutional sense, has discriminated directly or by implication against the citizens or products of other states. The logic of this reasoning and of this distinction is apparent when we remember that the object delegating the power of regulating commerce to Congress, was to protect the subjects of inter-state commerce from interfering state regulation. Protect for how long? Until they become part of the State property. Why? Because then they would be protected as all other State property, taxed as all other property, and classed with all other State property. How then could a state or municipal statute which treats the the subjects of inter-state commerce from the very beginning as all other like property is treated under like circumstances be held to be a regulation of such commerce.

It will therefore be seen that a State is not prohibited by the Federal Constitution from levying taxes upon goods which are the subject of inter-state commerce or upon persons engaged therein, and that taxes which indirectly affect inter-state commerce are not necessarily a regulation thereof, within the constitutional prohibition. The question therefore is not whether the Sunbury ordinance levied a tax upon goods which were the subject of inter-state commerce, or upon a person engaged in inter-state commerce, but whether the *enforcement* of such tax constitutes a *regulation* of inter-state commerce.

In the case of the American Steel Wire Co. vs. Speed, *supra*, the representatives of the American Steel Wire Co. journeyed from Chicago to Tennessee and took orders in Tennessee for the products of the American Steel Wire Company, which products were either then in a State other than

the one in which the orders were taken or were not yet manufactured. After a large number of orders were taken, the goods to fill these orders were shipped into the home State of the vendee and placed on storage for convenience of distribution and were subsequently distributed by the agents of the vendors to suit the convenience of the vendees, were charged upon the books of the vendors in the State of Illinois and credit extended to the vendee who resided in the State of Tennessee. These goods were delivered in their original shipping packages, and this Court held that the levying of a local tax upon the goods while awaiting delivery was not a regulation of inter-state commerce, and the same principle was decided in the cases heretofore cited.

Applying the facts of the case at bar, they are stronger than those of the case last above recited, for the reason that no credit was extended by the vendor in Columbus, Ohio, to the vendee in Sunbury, Pa., and for the further reason that the goods of the American Steel Wire Company were delivered to the vendee in unbroken packages and in the case at bar the packages of brooms were broken. Certainly there can be no difference between filing a number of orders for goods in an office in Chicago and sending sufficient goods to fill all of the orders to a warehouse in Memphis, and subsequently sorting them out, without breaking any packages, and delivering them to the several vendees as per order, as was done in the American Steel Wire Company case, and taking the orders in Columbus, Ohio, and marking on the several boxes the name of the vendee merely to facilitate delivery, and then sending them to Pennsylvania for delivery, which was subsequently made.

If the Sunbury ordinance is a regulation of inter-state commerce certainly the taxing provisions in the American Steel Wire Company case are also such a regulation, and if these taxing provisions of the American Steel Wire Com-

pany case are not a regulation of inter-state commerce, certainly the Sunbury ordinance cannot be.

This same parallel might be drawn between the case at bar and the case of Brown vs. Huston, *supra*, and Hinson vs. Lott, *supra*, and Woodruff vs. Parker, *supra*, with the same results.

B. Considered as a police regulation.

(a) The state, by virtue of its police power and its jurisdiction over persons and property within its limits, has the right to provide for the security of the lives, limbs, health and comfort of persons and for the protection of property. Leisy vs. Harden, 135 U. S. 109.

(b) The state, by virtue of its police power and its jurisdiction over persons and property within its limits, has the right to adopt precautionary measures against social evils and the enactment of such laws as have immediate connection with the protection of persons and property against the noxious acts of others. Railroad Co. vs. Husen, 95 U. S. 465.

(c) The police power has been held to justify the state in the adoption of legislation to prevent the spread of crime. Plumley vs. Mass., 155 U. S. 478.

The Borough Ordinance in question does not pretend to prevent the selling of commodities within the borough limits even though they be imported from outside, but it does pretend to regulate the manner by which a certain kind of selling can be done and by whom it can be done. If it is within the police power of a state to enact such laws as have immediate connection with the protection of persons and property against noxious acts, as was held in Rail-

road Co. vs. Husen, *supra*, and to enact laws to prevent the spread of crime, as was held in Plumley vs. Mass., *supra*., then, certainly, it is within the same power to enact laws to prevent, or at least regulate the "domiciliary visitations of itinerant peddlers and canvassers who assail the privacy of domestic life and who have mostly to deal with innocent and unsuspecting women and children, defrauding them of money and property and then fleeing to other states, leaving their victims without redress." Many peddlers of and canvassers for the sale of books, teas and other articles are honest and estimable people, but it is a business in which the vagrant, dishonest and violent, may readily engage, and in order to meet the legal requirements of classification the good must suffer with the bad. Its successful pursuit almost necessarily involves an intrusion into the private dwellings of citizens, with the incidental opportunities for theft and to observe the means of access for those intent upon future burglary. In order to, in some measure, guard against these evils and to protect families against incessant annoyance it is within the police power of a borough, for the promotion of good order, to identify those engaged in such business by requiring a license.

In the case at bar the defendant was delivering, among other things, groceries. Can it with reason be contended that the enactment of a law or ordinance which has in view the restriction of intrusive house to house solicitation, or the restriction of the opportunity to impose inferior goods and commodities upon the householder, or the restriction of opportunities for theft or burglary, is not a legitimate exercise of the police power of the state or city?

This Court has held in Wiggins Ferry Co. vs. East St. Louis, 107 U. S. 365, the exaction of a license fee is an ordinary exercise of a police power by municipal corporations aad the act by which the exaction is authorized from a ferry

plying between two states will not be held to be a regulation of commerce. In Howe Machine Co. vs. Gage, 100 U. S. 676, this Court held a state tax on peddlers of sewing machines which applies alike to machines manufactured in the state and out of the state is valid, and not repugnant to the United States Constitution. In this case the Court said, "In all cases of this class to which the one before us belongs, it is a test question whether there is any discrimination in favor of the state or of the citizens of the state which enacted the law. Where there is such discrimination it is fatal. Other considerations may lead to the same result." The question that was before the Court, was whether or not such a tax upon peddlers was a regulation of inter-state commerce within the constitutional meaning.

It has been held in Emert vs. Missouri, 156 U. S. 296, that a license tax upon peddlers of sewing machines was a proper police regulation. In this case the sewing machines were brought from another state and placed upon a wagon in their original packages and taken through the country and offered for sale, and actually sold. It has been held by this Court that where a peddler comes from another state and brings goods with him and travels through the second state and offers the goods which he carries with him, for sale, that he is a subject of police regulation, even though he expects to return to the first state.

In the case of Emert vs. Mo., Mr. Justice Gray speaking, for the Court, said, "The statute in question is not part of a revenue law, it makes no discrimination between residents or products of Missouri and those of other states, and manifests no intention to interfere in any way with inter-state commerce. Its object in requiring peddlers to take out and pay for a license, and to exhibit their license on demand to any peace officer or to any citizen householder of the commonwealth, appears to have been to protect the citizens of the

state against the cheats and frauds or even thefts which, as the experience of ages has shown, are likely to attend the itinerant and irresponsible peddling from place to place and from door to door." The evil aimed at, as pointed out by the Court, is the house to house visitation. If such house to house visitation by persons carrying goods with them is the subject of proper police regulation, certainly the business of taking orders from house to house one day and sending them across the state line or perchance carrying them across the state line, and delivering the goods the next day, is equally liable to such police regulation. If this be not so, then the itinerant peddler has but to leave his pack upon the border line of the state, pass over the border line, solicit orders from door to door and carry them across the border line, select from his pack goods to fill them, recross the border line and carry them to the places where they were ordered, and he will evade the state police regulation. The large vendor of wholesale merchandise who desires to sell his wares in Pennsylvania, without complying with its laws, need but locate his warehouse in Camden, N. J., and send his canvassers from house to house in Philadelphia, and neighboring towns, and when asked to take out a license or pay a license tax, then invoke the protection of the inter-state commerce clause of the Federal Constitution. If it is a proper police regulation to license the man who brings the goods from another state and leaves them in a warehouse and then solicits from door to door for the purpose of selling them; if it is a proper police regulation to license a person who brings goods with him from another state and seeks customers therefor from house to house, both of which questions have been ruled in the affirmative by this Court, why is it not a proper police regulation to license one who seeks his customers, then procures the goods from another State and delivers them from house to house? None of these laws are aimed at a regulation of inter-state com-

merce ; none place a burden upon inter-state commerce ; all are dealers, all are canvassers and all are alike taxed or licensed, whether residents or non-residents of the State.

Such remote connection with inter-state commerce was never intended as a passport to evade the laws of a State, and clause 3, section 8 of article 1 of the Federal Constitution was never intended by its great framers as a refuge for itinerant peddlers, house-to-house traders, book agents, map canvassers, and grocery solicitors, when called upon to answer the police and license tax laws of a State.

In Pennsylvania we have a statute making it unlawful to carry on any worldly employment on Sunday. Suppose the goods in question in the so called original packages had been delivered on Sunday, would it be seriously contended that the person delivering the goods and receiving the money therefor was not guilty of a violation of our Sunday laws simply because the goods came from another State and were yet in their so called original packages? This Court has decided that such a law, because it incidentally interfered with inter-state commerce, was not a regulation thereof within the Constitutional meaning.

Suppose Rearick had used an automobile to deliver the goods in question, would it be seriously contended that he was exempt from a Pennsylvania automobile license because he was delivering goods from another State? Carry the illustration a step further and suppose that Rearick had brought the goods from Ohio in an automobile, would it be seriously contended that he would be exempt from a Pennsylvania automobile license as he entered the State because he was carrying goods from another State? As well might it be contended that he would be for the same reason exempt from paying toll upon a piked road.

Prior to recent Congressional action one State could not prevent the introduction and sale of intoxicating liquors

brought from another State, yet it could prohibit the sale of such liquors to minors, habitual drunkards, &c., notwithstanding it was delivered to them in the original package. Commonwealth vs. Zelt, 138 Pa. 615. Why? Because a regulation of sales to this particular class was not a regulation of commerce. Ergo a regulation of sales from house to house is not a regulation of commerce.

Inter-state commerce refers to a free interchange of commodities between citizens of the different States, without regard to State lines. If this be correct then the laws relating to soliciting and delivering from house to house do not interfere with or regulate such interchange, and cannot be an invasion of the authority of the United States. They erect no barriers at the State line, provide for no inspection or stoppage, and levy no tax on the introduction into or transportation through the State of any sort of property whatever. The citizen of another State may come into Pennsylvania when he will and where he will, stay as long as he chooses, open as many places for the sale of his goods as he may see fit, and enjoy the same measure of freedom in regard to the conduct of his business as a native citizen. But when he comes within the State permanently or temporarily, he is under the protection of its laws, and the correlative duty of obedience rests on him. His rights are equal to, but not above, those of the citizen. He has no more right to sell intoxicating drinks without a license than a citizen; no more right to sell cigarettes to children, or oleomargarine to customers. No more right to run an automobile without a license because he is engaged in delivering goods across State lines than a citizen. He has no better right to solicit or deliver from house to house than a citizen. Otherwise would render the possession of the police power useless to the State. If it is true, as now contended, that the itinerant stranger who haunts the mining and manufacturing towns

of Pennsylvania, and possibly other States, in a manner scarcely conceivable by one not familiar with these districts, intruding himself upon the privacy of domestic life by his domiciliary visitation, often imposing upon the credulous housewife goods for which she has no need and can ill afford ; if it is true that such person is the ward of the Federal Constitution engaged in inter-state commerce with the power of the government of the United States interposed between him and the police power of the State, certainly we have stumbled on a startling and unlooked for result of the investment of the general government with the power to regulate commerce. But are not these matters of *local* interest? They are not national in their character like railroads, post roads, stage coach companies, steamboats, &c., such as the framers of the Federal Constitution evidently had in mind, and so long as these local laws do not discriminate in favor of the property or citizens of the State enacting such local laws, they do not and cannot, we submit, regulate commerce within the Constitutional meaning thereof.

III.

DOES THE SUNBURY ORDINANCE IN QUESTION VIOLATE SECTION 1 OF THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION IN THAT IT DISCRIMINATES IN FAVOR OF PRODUCERS, &C.?

In the case of American Sugar Refining Co. vs. State of Louisana, 179 U. S. 89, this same question was before this Court upon the following facts. The State of Louisana imposed a license tax upon all persons, &c., engaged in the business of refining sugar and molasses, and exempted from the operation of said statute, "planters and farmers grinding

and refining their own sugar and molasses," that is grinding and refining the sugar and molasses raised or produced by themselves.

The defense set up was that the act was in violation of the Fourteenth Amendment of the Federal Constitution in that it discriminated in favor of a certain class of refiners.

It will be noted that the facts of the case at bar, so far as the discriminating phase goes, are identical with the facts of the case above quoted, and we can advance no better argument in defense of our position, that the proviso in the Sunbury ordinance discriminating in favor of producers, does not thereby violate the Federal Constitution, than quoting from the opinion of this Court in American Sugar Refining Co. vs. State of Louisana, *supra*, in which Mr. Justice Brown, delivering the opinion of the Court, said, "The act in question does undoubtedly discriminate in favor of a certain class of refiners, but this discrimination, if founded upon a reasonable distinction in principle, is valid."

Of course, if such discrimination were purely arbitrary, oppressive or capricious and made to depend upon differences of color, race, nativity, religious opinions, political affiliations or other considerations having no possible connection with the duties of citizens as tax payers, such exemption would be pure favoritism and a denial of the equal protection of the laws and the law's favor, but from time out of mind it has been the policy of this government not only to classify for purposes of taxation *but to exempt producers from the taxation of the method employed by them to put their products upon the market* (the italics are Counsel's). The right to sell is clearly an incident to the right to manufacture or produce and it is at least a question for the Legislature to determine whether anything tending to prepare a product most perfectly for the needs of the market shall not be treated as an incident to its growth or production.

Again, this Court says in the same case, "The Internal Revenue Act exempts distillers who sell the products of their own stills from a tax as wholesale dealers in liquors. While no question of the power of Congress is involved this, with other instances, shows that its general policy does not differ from that of the Act in question, and that the discrimination is based upon reasonable grounds."

The Constitution of Louisiana classifies the refiners of sugar for the purpose of taxation into those who refine the products of their own plantations and those who engage in a general refining business and refine sugar produced by themselves or put in their hands by others, &c. * * * * The discrimination does not deny to persons and corporations engaged in general refining business the "equal protection of the laws."

In the court below Rearick strenuously contended that the Sunbury ordinance was a tax and not a police regulation, and Brennan vs. Titusville, 153 U. S. 289, was cited as an authority that all municipal licenses were taxes. Now, in order to avoid the ruling of American Sugar Refining Co. vs. State of Louisiana, *supra*, it is contended by Rearick, in his argument to this Court, that the Sunbury ordinance is not a tax and therefore the classification between dealer and producer, between trader and manufacturer, which is held by this Court to be valid (American Sugar Refining Co. vs. State of Loisiana) is not applicable to the case at bar. Certainly, whatever else the Sunbury ordinance may be, it is, under all the rulings of this Court, a license tax ; and if it happens, incidentally, to be a police regulation, it does not thereby lose its character as a license tax. And, even though it be a police regulation distinctively and exclusively, its classification is not in violation of the Fourteenth Amendment. The case of Connolly vs. Union Sewer Pipe Co., 184 U. S. 559, relied upon by plaintiff in error, does not apply. The act referred to in that case prohibited combina-

tions of capital &c. and to it was added a proviso that the act should not apply to agricultural products or live stock while in the hands of the producer or raiser. The evil aimed at in this act was the "combination of capital," and it could not be contended that the combination of capital among the producers of agricultural products as to those particular agricultural products was a *necessary incident to their production* and therefore to contend that people engaged in one line of business could lawfully make combinations of capital while those engaged in another line of busi- could not, would certainly be an unlawful discrimination.

In the Connolly Case, *supra*, the statute of Illinois did not provide for granting a license to do certain things, but imposed *an absolute prohibition* upon one class to form combinations and in effect granted open liberty to another class to do the thing prohibited, the prohibited thing not being necessarily germane to the business of the second class. It must be remembered there is a difference between *absolute prohibition* and *licensing*, and an equal difference in the authority to impose the same.

Mr. Justice Harland in delivering the opinion of this Court in Connolly vs. Union Sewer Pipe Co., *supra*, after referring to the case of the American Sugar Refining Co. vs. The State of Louisiana, *supra*, says, "The decision now rendered is not at all in conflict with with the views expressed in the two cases just cited (American Sugar Refining Co. vs State of Louisiana being one of them). It is sufficient to say that these cases had reference to the taxing power of the state and involved considerations that could not in the nature of things apply to state enactments like the one involved in the present case. The power to tax persons and property is an incident of sovereignty and the extent to which it may be exerted has been indicated in numerous cases. * * * A tax may be imposed only upon certain callings and trades, for

when a state exerts its power to tax it is not bound to tax all pursuits or all property that may be legitimately taxed for governmental purposes.* * * A state may in its wisdom classify property for purposes of taxation and the exercise of its discretion is not to be questioned in a Court of the United States so long as the classification does not invade the rights secured by the Constitution.

For instance, this Court has held that it is within the power of a state to impose a license upon an auctioneer engaged solely in selling imports in original packages, and it has held, on the other hand, in Leisy vs. Hardy, 135 U. S. 100, and Lyng vs. Michigan, 135 U. S. 161, (Explained in American Steel Wire Co. vs. Speed, 192 U. S. 518,) that a state had no authority to *absolutely prohibit* the sale of goods coming in from another state, thereby drawing the distinction between *prohibition* on the one hand and *license* or taxation on the other.

As was said by this Court in Diamond Glue Co. vs. United States Glue Co., 187 U. S. 611, where a state provided that foreign corporation doing business within its borders must first deposit a copy of its charter and deposit a fee. "The prohibition in this case is not absolute but is only conditional on the failure to deposit a copy of the plaintiff's charter and to pay a small fee * * * it can be avoided by compliance with the regulation."

Under a prohibitory enactment no one, under any circumstances, can do the thing prohibited. Under a license enactment all have an equal opportunity to obtain the license. To illustrate, the laws of Pennsylvania provide that the person who desires to sell intoxicating liquors must first obtain a license and, after the license is obtained, he is at liberty to engage in this business. His neighbor who undertakes the sale of intoxicating liquors without a license is liable to a penalty. Yet it has never been contended that he is denied

the equal protection of the laws because he cannot do what his neighbor across the street does with perfect freedom. And the reason is simple : The two men have equal opportunities to obtain the license, providing their personal qualifications be equal ; the one obtains it, the other does not ; they are equal before the law, and, while the business conducted by the one who has the license may be as detrimental to the community as if it were conducted by the one without a license, yet, nevertheless, the distinction is legally made. If, however, all persons within a given community were absolutely prohibited from selling intoxicating liquors, with no provision for a license or otherwise, except one certain class who might be engaged in some particular business or reside upon some particular street, this would be arbitrary discrimination, because the first class would not have the equal opportunity with the second, and it would be denying them the equal protection of the law.

An Act of Assembly of the State of Pennsylvania provides that any one desiring to practice the profession of medicine must first obtain a license therefor, and makes it a penal offence for any one undertaking to practice medicine without first obtaining a license ; so that one man can be thrust into prison for doing that which his neighbor does with perfect freedom. Yet both of these persons are given the equal protection of the law for the reason that they both have the opportunity, so far as the law is concerned, to become licensed practitioners of medicine. If, however, all persons were absolutely forbidden to practice medicine except those engaged in the manufacture of drugs, then the case would come within Connolly vs. Union Sewer Pipe Co., *supra.*

Again, many states have provided that an automobile or the driver thereof, must be licensed and provides a penalty for any one operating an automobile without a license. A., with a license, operates his machine with perfect freedom

under the protection of the laws; B., without a license, is thrown into prison for doing what A. is permitted to do; yet it has never been seriously contended that B. has been denied the equal protection of the laws under the Fourteenth Amendment. The reason is apparent: B. is not denied the privilege of operating his automobile, but is only disallowed from operating it without complying with certain conditions, which conditions are entirely within his reach, and he is given the same opportunity to obtain the license as his neighbor A. Yet, if all persons were absolutely prohibited from operating automobiles with a proviso that the prohibition should not apply to those engaged in the manufacture of them, this could with some reason be considered arbitrary discrimination and would be analogous to the case of Connolly vs. Union Sewer Pipe Co., *supra*.

If, then, soliciting orders and delivering goods from house to house had been *prohibited* by the Sunbury ordinance the ruling of Connolly vs. Union Sewer Pipe Co., *supra*, might apply, but as the ordinance provides for a license tax and not a prohibition it must come within the ruling of American Sugar Refining Co. vs. Louisiana, *supra*.

The discrimination complained of is that retailers are placed in one class and wholesalers in another. True, this is a discrimination, but discrimination is the very foundation of all classification. If there were no discrimination, there could be no classification. It is therefore not discrimination that causes a statute to violate the Constitution but *arbitrary* discrimination, discrimination foreign to the subject matter. Certainly retailers in one class and wholesalers in another is both reasonable as well as germane to the subject. In the one class the person who sells to the consumer, in the other the person who sells to the merchant to sell again. In the one class the itinerant canvasser who makes his domiciliary visitation and assails the privacy of domestic life and who

has mostly to deal with innocent and unsuspecting women and children. In the other the commercial drummer who calls upon the man of business at his place of business and takes his order for goods to replenish the merchant's stock, which goods are shipped direct to the merchant. Quoting from the Supreme Court of Pennsylvania, "There is a very clear distinction between the traveling salesman, or drummer, acting as the intermediary between the importer or wholesale dealer and the local trade ; and the itinerant canvasser who goes from house to house intruding himself into the homes of his prospective customers."

We submit that this classification is founded upon a reasonable distinction and that all persons of the same class are treated alike under the same circumstances. The other classification, viz, "Any person who sells goods and wares, &c., not of their own manufacture," in short, dealers in the one class and manufacturers and producers in the other is equally as distinctive. True, the dealer is required to have a license to do that which the manufacturer can do without a license, but when the manufacturer sells he sells not as a dealer, not as one who buys to sell again, but purely as an incident to his real business of manufacturing.

The classifications of the ordinance are reasonable and germane to the subject, and treats persons in the same class alike, under the same circumstances, and therefore does not deny to any one the equal protection of the law. It does not provide, as contended by plaintiff in error, that a manufacturer can send his representative into Sunbury and canvass from house to house without a license, but it provides that "all who sell or deliver goods, &c., not of their own manufacture," that is, the manufacturer may himself canvass without a license for goods he makes himself, but he cannot send his agent to canvass because the agent would not be "selling or delivering" goods of *his own* manufacture but

goods manufactured by his principal. Neither does it discriminate in favor of the dealer, as contended by the plaintiff in error. Persons who sell to the merchant at his residence or place of business at *retail* are subject to the same license tax as persons who sell to the laborer or lawyer. The only question that might arise is what quantity of goods constitutes "selling at retail" or "delivering at retail." As to the case at bar that question is adjudicated. The Court below found upon the agreed statement of facts that the plaintiff in error was "delivering at retail" and that finding cannot be question here.

The local grocer who desires to solicit from house to house or to deliver goods from house to house, as the plaintiff in error was doing, is required to pay the same license as that exacted from plaintiff in error. Under no construction of the ordinance can it be considered to carry with it a geographical discrimination.

If, then, the Sunbury ordinance is a police regulation, as plaintiff in error contends, and its object is to regulate house to house solicitation, we submit that its classification is within theruling of every decision of this Court. It doubtless has been and is the experience of the legislative body that practically no one solicits at *wholesale* from house to house and that few, if any, *manufacturers* travel from house to house with their own goods. This leaves the producer as the only exempt class. In short, the farmer with his market truck, his house to house visitation is regulated by other legislation, viz, by a market ordinance permitting him to make such visitations only on certain days and hours. To adapt the language of this Court in Otis & Gassman vs. Parker, 187 U. S. 606, the evil sought to be stopped was confined in the main to the dealer who sold at retail from house to house and therefore legislation providing for the licensing of such dealers would practically meet the objects of the legis-

lative body. In the case of Otis & Gassman vs. Parker, last above cited, the State of California provided that all contracts for the sale of corporate stock on margins should be avoided. The constitutionality of this act was attacked on the ground that it denied to some the equal protection of the laws, because the statute struck only at some and not all objects of possible speculation. Mr. Justice Holmes, speaking for this Court, said, "With regard to the objection that this provision strikes only at some and not all of the objects of possible speculation, it is enough to say that probably in California the evil sought to be stopped was confined in the main to stocks in corporations. * * * * If stopping the purchase and sale of stocks on margin would stop the gambling which it was desired to prevent, it was proper for the people of California to go no further in what they forbade. The circumstances disclose a reasonable ground for the classification and thus distinguish the case from Connolly vs. Union Sewer Pipe Co., 184 U. S. 540. We cannot say that treating stocks of corporations as a class subject to special restrictions was unjust discrimination and a denial of the equal protection of the laws."

Conditions in the mining and manufacturing towns of Pennsylvania may be and doubtless are wholly different from conditions in the towns of Indiana, Kentucky and many other states. These local conditions must be met by local legislation and if the local legislature meets these conditions by classification which is not arbitrary it need go no further. As above demonstrated, this has been done by the Sunbury Ordinance and we submit that it is no more necessary under the Fourteenth Amendment of the Federal Constitution to place wholesalers and manufacturers in the same class with retail solicitors than it is to place lawyers and doctors in the same class.

But, as we stated above, it is of little importance in this

case whether the ordinance is treated as a police regulation or a license tax, and it certainly cannot be disputed that it is a license tax.

Classification for the purpose of license taxation has been several times recognized by Congress. In 1813 a license tax upon the retailers of wines and spirits, for the purpose of providing for the war with Great Britain, was passed. In 1815 it was further enacted (3 Stat. at L., 205 Chap. 40) that it should not be construed "to extend to vine dressers who sell at the place where the same is made wine of their own growth. Nor shall any vine dresser for vending solely at the place where the same is made wine of his own growth be compelled to take out a license as a retailer of wine." In the Internal Revenue Act of 1862 (12 Stat. at L., 432 Chap. 119) a license tax was imposed upon retail dealers in all goods, wares and merchandise but with a proviso that the act should not be construed to require a license for the sale of goods, wares and merchandise made or produced and sold by the manufacturer or producer at the manufactory or place where the same is made or produced, &c. What then can be the difference between classification for taxation purposes and classification for license taxation? If a classification for *general taxation* purposes, such as in American Sugar Refining Co. vs. Louisiana, *supra*, between producer and dealer, does not violate the Fourteenth Amendment to the Constitution, as decided by this Court in American Sugar Refining Co. vs. Louisiana, *supra*, then how can the same classification for *license taxation* purposes violate the same clause of the Constitution?

Under the Sunbury ordinance all dealers, whether located in Sunbury borough or in a sister State, are alike taxed, without favor or discrimination, none are *prohibited*. The exempt class are not dealers, but are manufacturers and producers, are people chiefly engaged in another line of busi-

ness and, while they may also sell their goods the same as a dealer, yet selling their goods or products is not their principal business but, as decided in the cases heretofore cited, is only an incident to their real business, viz, that of producing or manufacturing.

Had this ordinance provided that dealers residing without the state or without the borough should be taxed and that those residing within the state or within the borough should not be taxed, then the position of the plaintiff in error would be well taken, but where dealers are placed in one class and manufacturers and producers in another, and the one class taxed and the other not taxed, we contend that all persons of the same class have been treated alike, under the same circumstances, and that therefore the ordinance is not in violation of the Fourteenth Amendment of the Federal Constitution.

CONCLUSION.

FIRST.—We believe we have demonstrated beyond a doubt that there were no negotiations of sales across State lines ; that when the goods were brought into this State, as to the brooms the original packages were broken, the property co-mingled with the property of the State of Pennsylvania, and was carried from house to house, and that therefore the plaintiff in error was not engaged in inter-state commerce.

SECOND.— We believe we have demonstrated beyond a doubt that, even though the Sunbury ordinance might by the most libéral construction that could be placed upon it, in favor of the plaintiff in error, be considered as a remote interference with inter-state commerce, it could not be considered a constitutional regulation thereof, considered either as a license tax or a police regulation.

THIRD.—We believe we have demonstrated beyond a doubt that there is a marked distinction between a statute enacting a prohibition and a statute levying a license tax, and that there is no difference between classification for general taxation purposes and classification for license taxation purposes, and that, therefore, the classification in the Sunbury ordinance is a proper classification and does not violate the Fourteenth Amendment to the Federal Constitution.

In short, we believe we have demonstrated beyond a doubt that the Sunbury ordinance bears every test of constitutionality to which it has been submitted by the plaintiff in error and that it is therefore the basis of a valid conviction.

Respectfully submitted,

HARRY S. KNIGHT,
S. P. WOLVERTON,
Attorneys for Defendant in Error.